FREE SPEECH AND SPEAKER'S INTENT

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A few years ago, in an exchange with Cass Sunstein and Frederick Schauer, I criticized efforts to distinguish "high value" and "low value" speech, as the Supreme Court, Sunstein, and others have urged from time to time.[1] Any particular "unit" of speech, however such a unit is individuated, may convey an indefinite number of ideas to its audience. The ideas conveyed vary depending upon what the unit of speech is taken to be, the context into which it is placed, and the audience to which it is presented. Some ideas may seem more valuable than others—because we think some are true and important, while others are either false or banal—but we cannot locate the ideas that audiences derive from speech *in* the speech itself. We cannot ban "low value" ideas by banning, say, "low value" movies because audiences may derive low value ideas from high value movies and vice versa. A medical textbook may be neglected by physicians but eagerly sought by those who are sexually aroused by its pictures of sexual organs; a book of "pornographic" photographs may be profitably studied by psychologists and sociologists in whom it produces no sexual arousal whatsoever. The ideas that speech evokes are not locatable *in* the symbols employed.[2]

In the same exchange, I also argued against locating the "value" of speech in the intentions of its authors.[3] My reason was similar to my reason against locating value in the speech it-

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1. Larry A. Alexander, *Low Value Speech*, 83 Nw. U. L. Rev. 547 (1989). See also Cass R. Sunstein, *Low Value Speech Revisited*, 83 Nw. U. L. Rev. 555 (1989); Frederick Schauer, *The Aim and the Target in Free Speech Methodology*, 83 Nw. U. L. Rev. 562 (1989).

2. This is not to say that we cannot predict with some confidence what ideas various audiences will receive from particular symbols. If we could not so predict, successful communication would be just a random event. It is to say, however, that the ideas symbols produce in audiences are as much a matter of the nature of the audience and the context as the symbols themselves.

This point also explains why there is no principled way to demarcate what is to count as a unit or item of speech for purposes of assessing whether the speech is high or low value. Consider (1) a photograph of two people fornicating (2) found within a medical textbook (3) being viewed by voyeurs (4) who are being studied by psychologists.

3. See Alexander, 83 Nw U. L. Rev. at 548-49 (cited in note 1).

self. Whatever the author intends to communicate by her speech, it is always possible and indeed highly likely that the ideas the audience receives will be different. *Das Kapital* may be a "high value" work for most of its audience even if Karl Marx meant it as a joke, or even if it was the product of the proverbial thousand monkeys on typewriters. Pornography intended by its author only for the audience's arousal and the author's profit may turn out to be highly useful in sociological and psychological studies, just as a medical textbook may end up being read mostly by voyeurs in search of "dirty pictures." (Popular culture in particular is a rich mine of works intended as "high brow" that end up as "low brow" entertainment and works intended as entertainment that end up being subjects of serious debate and discussion.)

I concluded that for purposes of first amendment jurisprudence, the principal focus should not be on the value inhering in some tangible item of speech or the communicative intentions of authors. Instead, the focus should be on the government's reasons for regulating.[4] If the government regulates because it wishes to prevent an audience from considering certain ideas, either as an end in itself or, much more likely, as a means to some further end, then the First Amendment is in play. If the government's reason for regulating is not to prevent an audience from considering certain ideas, the First Amendment is probably not in play (or at least the jurisprudence shifts to the less stringent time, place, and manner analysis). The government's aim to suppress ideas is both sufficient and necessary for invoking standard first amendment jurisprudence. Once the First Amendment is in play, however, the value of the targeted idea may be relevant (if the idea were a false factual proposition, for example, or revealed private, embarrassing facts).[5] Additionally, the way in which the possession of the idea leads to harm will be relevant and often determinative.[6]

In a recent article, Sunstein appears to agree with me that the locus of the value of speech is not any particular tangible item.[7] He rightly points out that all speech is "symbolic conduct," and that any conduct can be used to symbolize ideas.[8] Thus, it would be wrong to locate pornography's "low value" *in*

4. Id. at 553.
5. Id. at 554.
6. Id.
7. Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. Chi. L. Rev. 795, 808 (1993).
8. Id. at 833-34.

the tangible work itself rather than in the message the author was intending to communicate and the audience was receiving.

Sunstein, however, ignores the remainder of my analysis and makes the author's intentions central to first amendment analysis. His position now is that "speech qualifies for protection if it is intended and received as a contribution to social deliberation about some issue."[9] More precisely, "conduct carrying a political message qualifies as speech within the meaning of the First Amendment . . . . When it is expressive and communicative but nonpolitical, such conduct belongs in a second tier of protection ["low value" speech] . . . ."[10]

In his latest article, as well as in the article to which I initially responded, Sunstein is searching for a way to justify suppression of pornography because pornography promotes a view of women that impedes women's achievement of equality.[11] In my view, if government attempts to suppress pornography for this reason, it is conceding the "political" nature of pornography. For first amendment purposes, bannning pornography for this reason is no different from banning political tracts that urge the subordination or sexual enslavement of women.[12]

Sunstein's present position is that unless the pornographer is intending to convey such a message, the pornography is not high value political speech and is more easily regulable. For him, the author's intent is central to first amendment analysis, whereas for me, the government's intent is central. Let me briefly list some of the problems with Sunstein's view.

First, Sunstein's view fails to bring within the First Amendment many governmental regulations that appear intuitively to raise first amendment concerns. I already mentioned the possibility that *Das Kapital* was intended, not as a serious political tract, but as a joke (low value entertainment), or that it was "written" by a thousand monkeys on typewriters (no authors' in-

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9. Id. at 834.

10. Id. at 835. See also Cass R. Sunstein, *Democracy and the Problem of Free Speech* 130-31 (Free Press, 1993) (the highest level of protection goes to political speech, which is speech that is both intended and received as a contribution to public deliberation about some issue).

11. Sunstein, 60 U. Chi. L. Rev. at 804-13, 817-22 (cited in note 7); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 Duke L.J. 589.

12. Alexander, 83 Nw. U. L. Rev. at 547-48 (cited in note 1). Catharine MacKinnon apparently accepts this conclusion, though for her it means that government should ban the political tracts as well as pornography, not that it should ban neither. See Catharine A. MacKinnon, *Only Words* 106-07 (Harvard U. Press, 1993). Sunstein, however, wants to stake out a middle ground in which pornography, but not political tracts, is bannable *because of its political message.*

tention). If government were to attempt to suppress it because of a fear that it would give readers subversive ideas, Sunstein's position would give government a first amendment green light. The fact that the audience is "receiving" the book as political does not help Sunstein's position. If an effect on the audience's political ideas were enough to bring the First Amendment into play in the absence of an author's political intent, then pornography could not be regulated on the feminist rationale.[13]

The same analysis applies if the government prohibits people from observing a rock formation because it fears they will be inspired by it to adopt socially harmful views, or if it bans military toys because it believes they inculcate militarism. There are no authors' intentions here, but there are surely free speech issues. The same applies to bans on political tracts written by those, such as foreigners, who have no first amendment rights.

Sunstein's approach also leads to a good deal of indeterminacy. Conduct, including but surely not limited to the production of books, movies, art, and so forth, will be regulable or not depending upon whether the actor intends to express some idea through the conduct and whether the idea is "political." The first amendment status of all conduct will depend in part on the actor's intention.[14]

Of course, merely because an actor intends a political message through his conduct does not mean that the conduct is constitutionally immunized from regulation. As Sunstein tells us, much politically expressive conduct is regulable notwithstanding its high value first amendment status because government has a compelling interest in regulating it.[15] That points to a third problem with Sunstein's approach, which is that the approach will trivialize the compelling interest test. Or, put differently, lots of governmental interests that we ordinarily would not think of as "compelling" will come out as such under Sunstein's approach. Sunstein himself gives an example of this when he says that political graffiti on public monuments can be prohibited (despite the author's political intention) because the government has a "powerful" interest in "protecting public monuments."[16] The point is that under Sunstein's approach, all of the multitude of everyday regulations which we do not believe people should be able to violate just because they have a political point to make will end

13. Sunstein is in fact explicit that speaker's political intent is necessary for deeming speech political. See note 10 supra.

14. See Sunstein, 60 U. Chi. L. Rev. at 834-36 (cited in note 7).

15. Id. at 834-35.

16. Id. at 834.

up being deemed to serve "powerful" government interests. The result will be that any government interest—including keeping people from sleeping in parks, preventing the destruction of draft cards, and so forth—will be a "compelling" interest, and the compelling interest test will be analytically useless.

Sunstein is not alone in the error of focusing on the speaker's intent in first amendment analysis. The Supreme Court itself in *Brandenburg v. Ohio*[17] appears to make the first amendment status of speech that incites imminent lawless action turn on whether the speaker intended the incitement. That position is counterintuitive, however. Although the speaker's state of mind should be material to criminal law analysis, it should be immaterial to the first amendment status of the speech, at least if there is no danger of chilling protected speech. If I know that my speech will "incite" someone to commit an illegal act immediately, before there is an opportunity for counterspeech, then it should be immaterial that I do not "intend" the illegal act. (When I do not know that my speech will incite others to illegal acts but am negligent in that regard, punishing me may be of first amendment concern because it may chill other, protected expression. In that sense, my mental state is material to the First Amendment in the same way that it is in defamation cases, derivatively and instrumentally, but not because it affects the first amendment status of the speech per se.)

It is not the speaker's intention in speaking but the government's intention in regulating that should bring the First Amendment into play. If the government closes a beach because conditions are unsafe, that should *not* be a first amendment case. If it closes the beach because people are getting subversive ideas from looking at the ocean, that *should* be a first amendment case. If government forbids destruction of draft cards because of the costs of reissuing them, that should *not* be a first amendment case, even if some who destroy draft cards do so to express political ideas. If government forbids destruction of draft cards to prevent those political ideas from being communicated, that *should* be a first amendment case, even if no one intends a political message in destroying a draft card.

Once the First Amendment is triggered by virtue of government's regulatory intention, the analysis should focus on the ultimate harm the government is seeking to avert by interdicting the receipt of a message and the causal mechanism through which receipt of the message leads to the harm. Traditional first

17. 395 U.S. 444 (1969).

amendment analysis largely does just this, and first amendment cases can be usefully grouped according to the types of harm messages cause and the causal mechanisms by which they cause those types of harm.[18]

Under my analysis, the First Amendment is not implicated by regulations that impact speech but that are based on speech-independent governmental reasons, those that Larry Tribe would call Track Two regulations.[19] (An example is government's closing the beach because of unsafe conditions when that closure prevents people from receiving political "messages" caused by viewing the ocean, or, more prosaically, prevents people from congregating and discussing politics.) My analysis implies a First Amendment with only one track. So whereas Sunstein's "speaker's intent" approach is underinclusive in the respects I have listed, my "government's intent" approach is underinclusive in others.

I have two responses to this point. First, Sunstein's approach handles Track Two cases badly by stretching the notion of a compelling governmental interest to the point of uselessness.[20] Second, I believe that Track Two jurisprudence has been an extremely unsuccessful jurisprudential exercise, with only a few very arbitrary victories for speakers in a period of over fifty years.[21] It should be dropped from first amendment analysis.

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To paint with a very broad brush, there are two dominant views in the jurisprudence and the scholarly commentary regarding the nature of constitutional free speech. On one view—the

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18. For example, the harms government seeks to prevent through content regulation include: illegal actions; revelations of private facts, confidences, and secrets; invasions of copyrighted and related property interests; defamations; inflictions of emotional distress; offenses to sensibilities; disruptions of workplace relationships; coercion; and so on. The causal mechanisms can be usefully divided into those that require sanctionable listener choices in response to the content for the harms to occur (e.g., incitement to crime); those that require responsible but nonsanctionable listener choices in response to the content for the harms to occur (e.g., defamation; revelation of national security information to foreign powers); and those that do not require any listener choices for the harms to occur (e.g., revelation of embarrassing private facts).

19. Laurence H. Tribe, *American Constitutional Law* § 12-2, at 791 (Foundation Press, 2d ed. 1988).

20. See text accompanying notes 15-16 supra.

21. See Larry A. Alexander, *Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory*, 44 Hastings L.J. 921 (1993). The two Track Two cases decided by the Supreme Court after publication of the cited article do nothing to call this observation into question. See *City of Ladue v. Gilleo*, 114 S. Ct. 2038 (1994); *Madsen v. Women's Health Center*, 114 S. Ct. 2516 (1994).

view I hold—free speech is about limitations on the government's authority *deliberately* to control what facts we know and what arguments and ideas we consider. On the other view, free speech is about the quality of public discourse. The primary shortcoming of the first view is that it has nothing to say about the myriad government rules and decisions that, though not aimed at our beliefs and attitudes, have profound effects on our beliefs and attitudes and ultimately the quality of our democratic self-rule and our personal autonomy.

The primary shortcoming of the second view is that it *requires* rather than forbids government deliberately to affect our information, arguments, and ideas; and thus it necessitates recourse to an Archimedean point from which information, arguments, and ideas can be evaluated.[22] Government policy, which depends for its legitimacy on being the product of the public discourse, is on this view to be directed toward structuring that very discourse.[23] Deliberate censorship, the core first amendment violation on the first view, becomes on this view a first amendment command.[24]

Sunstein's concerns seem to align him more with the second view than the first. Yet, the jurisprudential apparatus he employs—a hierarchy of types of speech, with "political" receiving the greatest protection; the reliance on speaker's intent to bring conduct within the First Amendment and to identify its place in

22. Reference to the lack of an Archimedean point may seem like a cheap shot. Is it really impossible to determine whether government is enriching or impoverishing public discourse?

Of course it is not impossible to do so from anyone's particular point of view. Each one of us knows what would be an improvement of the public discourse—which ideas should receive more play and which should receive less. Each one of us knows when the public discourse is "balanced" and "diverse" and when it is not.

The problem is that there is no noncontroversial overarching point of view from which these evaluations can be made. Would we be happy if the government decided that there was too much in the way of speech resources devoted to free market arguments, sitcoms, and baseball and too little devoted to monarchism, socialism, art history, and rugby? Some of us would, and some would not. From what or whose perspective should this government attempt deliberately to structure the public discourse be judged? The majority's? The Supreme Court's?

23. Again, I am not denying the obvious truth that under my view, government actions also structure the public discourse. All laws and governmental acts result in a particular distribution of resources and set of regulations that affect what gets said by whom and to what effect. On my view, however, these government actions may structure the public discourse not as a matter of deliberate aim but only as an unintended consequence of other goals. On my view, free speech is a deontological principle about the respect government must show for people's autonomy, not a consequentialist one about how to structure public discourse.

24. Whenever government determines that enough has been said on some topic, or that a given idea is really the same as one that has already been "adequately voiced," it is necessarily engaged in censorship.

the speech hierarchy; and the compelling governmental interest test for non-content-related restrictions on expressive conduct—does not fit neatly with either view. Perhaps he wishes to steer a middle course between the two camps and believes his jurisprudence produces the advantages of both views and the shortcomings of neither. From where I sit, however, Sunstein's jurisprudence, particularly his reliance on speaker's intent, has no such redeeming virtue. It is an approach in desperate need of a rationale.